BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

NORMA JEAN FOSTER, Claimant, vs.	)	
NORTH AMERICAN VAN LINES, INC., Respondent, and	)	Docket No. 137,151
NATIONAL UNION FIRE INSURANCE CO., Insurance Carrier, and	)	
KANSAS WORKERS COMPENSATION FUND.	)	

ORDER

ON the 26th day of April, 1994, the application of the respondent for review by the Workers Compensation Appeals Board of an Award entered by Special Administrative Law Judge William F. Morrissey dated February, 17, 1994, came on for oral argument in Chanute, Kansas.

APPEARANCES

The claimant appeared by and through her attorney, C. A. Menghini of Pittsburg, Kansas. The respondent and its insurance carrier appeared by and through their attorney, Mark E. Fern of Pittsburg, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Blake Hudson of Fort Scott, Kansas. There were no other appearances.

RECORD

The record before the Appeals Board is the same as that considered by the Special Administrative Law Judge as specifically set forth in the Award of February 17, 1994.

STIPULATIONS

The stipulations set forth by the Special Administrative Law Judge in his Award dated February 17, 1994, are hereby adopted by the Appeals Board for purposes of this order. Additionally, for purposes of this review the parties stipulate that average weekly wage and temporary total as found by Special Administrative Law Judge William F. Morrissey were correct and that no issue exists regarding those issues.

ISSUES

1. Whether the parties are covered by the Kansas Workers Compensation Act.

2. Whether the relationship of employer and employee existed on the date of the accident.

3. The nature and extent of disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Whether the parties are covered by the Kansas Workers Compensation Act.

The claimant met with personal injury by accident on April 1, 1987. The claimant was injured when a tractor trailer truck she was driving was involved in a collision with another tractor trailer truck on April 1, 1987. The accident and injury occurred in Effingham, Illinois.

The tractor trailer unit claimant was driving belonged to Mr. Maurice King. Mr. King had an exclusive contract to haul freight for North American Van Lines, respondent herein.

The claimant testified she was hired by Maurice King for the purpose of driving the truck leased to North American Van Lines. The claimant testified she was originally offered a job as a co-driver by Mr. King, via telephone, while claimant was in Kansas. The claimant testified that she accepted the offer of employment by telephone from her residence in Pittsburg, Kansas. Subsequently, Mr. King picked up the claimant in Joplin, Missouri, for purposes of performing the duties as a co-driver.

After being picked up by Mr. King, claimant completed a road test in Oklahoma, written test, DOT physical, and all requisites of North American Van Lines to drive a tractor trailer unit. From March 10, 1987 through April 1, 1987 claimant worked as a co-driver for Mr. King pulling a North American Van Lines trailer. At the time of her employment in Kansas, claimant possessed a valid chauffeur's license and was certified to drive a tractor trailer unit.

North American Van Lines acknowledged claimant as an employee on Indiana workers compensation documents and acknowledged National Union Fire Insurance Company as the insurance carrier. On the date of injury, claimant was designated "temporarily qualified" and subsequent to the accident was designated as "fully qualified".

K.S.A. 44-506 provides in pertinent part:

"Provided, that the workers' compensation act shall apply also to injuries sustained outside the state where:
(1) The principle place of employment is within the state; or
(2) The contract of employment was made within the

> state, unless such contract otherwise specifically provides..."

There is no evidence of record to support a finding that Kansas was the principle place of employment as contemplated in K.S.A. 44-506. See Knelson v. Meadowlanders, Inc., 11 Kan. App.2d 696, 732 P.2d 808 (1987). Claimant instead relies on the second part of the test set forth in K.S.A. 44-506. Claimant relies on the testimony pertaining to the telephone conversation with Mr. King and asserts that the telephone conversation constitutes a contract made in Kansas. Respondent asserts that the contract of employment did not occur in Kansas since claimant had to take the DOT physical, perform the written and driving tests, and complete other steps to become fully qualified by North American Van Lines.

Claimant testifies she was offered a job by Maurice King by telephone when she was living in Kansas; and claimant testifies that the same was accepted by her in Kansas. No evidence to the contrary was offered to refute the offer being made while claimant was in Kansas, nor was there any evidence presented to refute the acceptance. Therefore, the Appeals Board finds this contract was made in Kansas.

The Kansas Supreme Court has held that a contract is made within Kansas when the last act necessary to the formation of the contract is done in Kansas. Smith v. McBride Dehmer Construction Company, 216 Kan. 76, 530 P.2d 1222 (1975). In Pearson v. Electric Service Company, 166 Kan. 300, 201 P.2d 643 (1949), the court held that "where an acceptance is given by telephone the place of contracting is where the speaker speaks his acceptance". Id. at 203. Accord, Neumer v. Yellow Freight Systems, Inc., 220 Kan. 607, 556 P.2d 202 (1976). In this case, the last act necessary to complete the employment between Maurice King and claimant was her acceptance of the offer made by King during the previously mentioned telephone conversation.

Respondent argues the final act necessary to complete the contract was done in Indiana, the state of respondent's home office. However, the evidence supports that co-drivers were paid by the owner-operator, in this case Maurice King, and there is no evidence to suggest that Maurice King did not have authority to hire co-drivers. The Appeals Board finds that the contract of employment between the claimant and Maurice King was made within the State of Kansas. Maurice King was in the business of operating tractor trailer units for respondent. Claimant was employed by Mr. King to carry out respondent's contracts to deliver North American Van Lines' freight around the country. The Appeals Board therefore finds that the parties are covered by the Kansas Workers Compensation Act.

2. Whether the relationship of employer and employee existed on the date of the accident.

As stated previously, the claimant was hired by Maurice King to operate a tractor trailer unit to haul freight for North American Van Lines. The evidence clearly establishes that Mr. King paid claimant as co-driver for purposes of completing contractual obligations between Mr. King and North American Van Lines. The evidence also establishes at the time of the accident, claimant was actually driving a tractor trailer unit and hauling goods for North American Van Lines as a "temporarily qualified" driver. There can be no doubt that part of North American Van Lines trade or business is to transport goods from one place to another by tractor trailer unit. Claimant was hired as a co-driver to further the trade or business of the respondent, North American Van Lines. The evidence clearly reflects a contract between North American Van Lines and Maurice King to transport goods for North American Van Lines.

K.S.A. 44-503(a) provides as follows:

> "Where any person (in this section referred to as principal) undertakes to execute any work which is part of his trade or business or which he has contracted to perform or contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay any workman employed in the execution of the work any compensation under the workmen's compensation act which he would have been liable to pay if that workman had been immediately employed by him; and where compensation is claimed from or proceedings are taken against the principal, then in the application of the workers' compensation act, references to the principal shall be substituted for references to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the workman under the employer by whom he is immediately employed."

The purpose of the statutory employer provision was set forth in Atwell v. Maxwell Bridge Company, 196 Kan. 219, 409 P.2d 994 (1966). As follows:

> "The purpose of this statute is to give employees of a sub-contractor a remedy against a principal contractor and prevent employers from avoiding liability to an injured workman by contracting with an independent contractor to do a portion of the work undertaken by the principal (contractor). The statute, being primarily for the benefit of the injured workman, also provides protection when no recovery can be had against a sub-contractor or its insurance carrier because they are financially unable to pay the compensation award." Id. at 221.

The Appeals Board finds that the claimant, on the facts of this case, was a statutory employee of North American Van Lines on the date of the accident. The contract of employment between King and North American Van Lines serves as the fundamental premise for predicating liability pursuant to K.S.A. 44-503(a). See Ellis v. Fairchild, 221 Kan. 702, 562 P.2d 75 (1977). The statutory employer's statute is to be liberally construed to effectuate the purposes of the workers compensation act. Bailey v. Mosby Hotel Co., 160 Kan. 258, 160 P.2d 701 (1945).

The work that was performed by the contractor Maurice King and claimant was an inherent and intricate part of respondent North American Van Lines' principle trade or business. Further, the work being done by Mr. King and the claimant would ordinarily have been done by employee's of North American Van Lines had North American Van Lines not contracted with Mr. King. See Woods v. Cessna Aircraft Co., 220 Kan. 479, 553 P.2d 900 (1976).

3. The nature and extent of claimant's disability.

After her release from the hospital and her return home, the claimant was initially treated by Dr. Adolph Mueller, a board certified orthopedic surgeon beginning in July of 1987. Her complaints at the original examination by Dr. Mueller on July 6 and July 9, 1987, consisted primarily of wrist complaints. Dr. Mueller performed left carpal tunnel release surgery on October 29, 1987, and right carpal tunnel release surgery on December 1, 1987. Dr. Mueller continued to follow the claimant and on March 15, 1988, released claimant to return to work and rated her condition as 5% to each upper extremity.

The claimant next saw Dr. Ernest Neighbor on November 21, 1988. At that time, claimant was experiencing symptoms similar to those she had previously experienced in her wrist prior to the bilateral carpal tunnel releases. Claimant had positive Phalen and Tinels tests on both wrists reflecting recurrent bilateral carpal tunnel problems. Dr. Neighbor found that claimant was experiencing recurrent bilateral carpal tunnel syndrome. Claimant's hands were going to sleep and were waking her at night. Dr. Neighbor had additional testing done and continued to periodically see the claimant. Dr. Neighbor saw the claimant on May 8, 1989 at which time she had similar complaints. Dr. Neighbor also diagnosed a C-6 radiculopathy on the left side and testified claimant injured a cervical disc as a result of the accident of April 1, 1987. On October 29, 1990, Dr. Neighbor issued a report rating the claimant at 17% permanent partial impairment to the body as a whole. He also indicated that he did not think she could return to driving a truck because he did not feel she could grip the steering wheel for an 8 hour period. Dr. Neighbor did feel that she could drive for shorter periods of time and could do light to moderate lifting.

Dr. Neighbor next saw the claimant on December 26, 1990, and claimant was complaining of severe pain in her hands. Dr. Neighbor referred claimant to Dr. Cooley and Dr. Bennett for further treatment. Dr. Neighbor last saw the claimant on February 26, 1992. At the time of his last visit, Dr. Neighbor felt the claimant was suffering from scleroderma as well as continued median nerve compression. Dr. Neighbor indicates the scleroderma had definitely increased her disability. After that visit, Dr. Neighbor rated the claimant at 44% impairment body to the whole. Dr. Neighbor also finds that he did not know if the scleroderma was related to the motor vehicle accident on April 1,
1987. Dr. Neighbor agreed that between his last visit with claimant on October 25, 1989, and his visit with claimant on December 26, 1990 there was a significant change in the claimant's symptoms and her condition had significantly worsened.

The claimant was involved in another automobile accident on August 21, 1990. Dr. Neighbor agreed that the impact of the August 21, 1990, accident where the claimant's car struck a tractor trailer unit that turned left in front of her would be consistent with injuries to her neck. Dr. Neighbor first used the term "severe" to describe the claimant's pain after the August 21, 1990, accident. Dr. Neighbor indicated the claimant's symptoms were probably aggravated by the August 21, 1990, accident. Dr. Neighbor indicated that the EMG taken after the 8/21/90 injury showed a worsening of claimant's condition.

The claimant was referred by Dr. Neighbor in 1991 to David A. Cooley, M.D., a board certified doctor of internal medicine and rheumatology. Dr. Cooley first saw claimant on October 3, 1991. Nerve conduction studies done by Dr. Cooley were normal. The claimant had complaints of swollen hands, poor grip strength and lack of flexibility in her hands. Dr. Cooley testified all these symptoms were consistent with connective tissue disorders. Dr. Cooley further testified that swelling of the hands, puffiness, and inability to make a fist, were not consistent with carpal tunnel problems. The claimant saw Dr. Cooley again in January of 1992 and Dr. Cooley tentatively diagnosed scleroderma. Dr. Cooley testified that scleroderma was not caused by trauma such as an automobile accident and the conditions he treated claimant for were not attributable to the motor vehicle accident of April 1, 1987. Dr. Cooley further testified that a good deal of claimant's present disability was attributable to scleroderma and not the accident of April 1, 1987.

The Appeals Board finds that after consideration of all the medical testimony, the claimant has met her burden of proof that as a result of the April 1, 1987, accident, claimant suffered bilateral carpal tunnel syndrome injury and a cervical spine injury at the C6 level. Further, claimant has developed, not resulting from the injury, a connective tissue disorder known as scleroderma. The evidence establishes that the connective tissue disease is the cause of much of claimant's disability.

The Appeals Board finds that the opinion of Dr. Neighbor who treated, released and rated claimant before diagnosis of the connective tissue disease and before symptoms attributable to that condition arose most accurately defines the impairment attributable to the April 1, 1987. Dr. Neighbor rated the claimant at 17% permanent partial impairment to the body as a whole, as a result of the April 1, 1987 injury. Dr. Neighbor's 17% rating of October 29, 1990, does not take into account the impairment attributable to the connective tissue disorder and the Appeals Board finds that the rating of Dr. Neighbor of October 29, 1990, of 17% should be adopted as the permanent partial impairment suffered by claimant in this case.

Regarding work disability, Dr. Neighbor issued restrictions on October 29, 1990, which were based strictly on her physical condition attributable solely to the April 1, 1987, injury. Dr. Neighbor indicated that the claimant could not grip the steering wheel for an eight (8) hour period. Dr. Neighbor, however, did indicate claimant was capable of driving shorter periods of time and capable of light to moderate lifting.

Prior to July 1, 1987, K.S.A. 44-510e(a) defined work disability as follows:

> "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the workman to engage in work of the same type and character that he was performing at the time of his injury, has been reduced."

In Anderson v. Kinsley Sand and Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976) the Supreme Court defined work disability as that portion of the job requirements that a worker is unable to perform by reason of an injury. Further clarification of the pre-July 1, 1987, work disability test is found in Ploutz v. Ell-Kan Co., 234 Kan. 953, 676 P.2d 753 (1984). In Ploutz the court stated the determinative factor to be what portion of the worker's job requirements he or she is unable to perform because of the injury. Stated another way, work disability is defined pre-July 1, 1987 as the extent in which the ability of the worker to engage in work of the same type and character that he or she was performing at the time of the injury, has been reduced.

In Ploutz, the claimant argued she was entitled to a 100% permanent partial disability award because she could not return to her previous job. The court held the fact that a worker is not able to return to the job they were performing at the time of their injury is not determinative. In Ploutz, the court held that the test for permanent partial disability or work disability is what portion of the work the worker is no longer able to perform because of the injury. The court found the claimant in Ploutz could still perform 60% of her work tasks and awarded benefits based upon a 40% work disability award.

The evidence in this case, based on Dr. Neighbor's restrictions, would in all likelihood prohibit claimant from returning to her job as a co-driver for respondent and statutory employer North American Van Lines. However, as noted by the court in Ploutz, the proper test for permanent partial disability or work disability is what portion of the claimant's job as co-driver that she was performing on the date of the injury can she no longer perform. The record does not contain significant evidence as to the job tasks required as a co-driver, nor is there any evidence as to what portion of the job claimant can no longer perform. Since claimant can do some driving and some light to moderate lifting and she apparently was not required to drive all the time since she was designated a co-driver, there undoubtedly would be some portions of the job as co-driver she could perform subsequent to the injury, not taking into account the connective tissue disorder.

K.S.A. 44-501(a) places the burden of proof on all issues squarely on the claimant to prove the various conditions on which the claimant right to compensation depends.

After careful review of the entire record, the Appeals Board finds that the claimant has failed to meet her burden of proof in establishing what portion of her job she is unable to do as a result of the injury and therefore has failed to meet her burden of proof in establishing a work disability in this case. The Appeals Board therefore finds that claimant is not entitled to compensation based on a work disability. The Appeals Board finds that the claimant is entitled to an award based on a 17% permanent partial impairment to the body as a whole.

AWARD

Wherefore, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey, dated February 17, 1994, should be, and hereby is modified as follows:

WHEREFORE AN AWARD OF COMPENSATION IS HEREIN ENTERED IN FAVOR of claimant, Norma Jean Foster, and against the respondent, North American Van Lines, Inc., and the insurance carrier, National Union Fire Insurance Company and the Kansas Workers Compensation Fund for an accidental injury which occurred on April 1, 1987 and based on an average weekly wage of $200.00, for 125.29 weeks of temporary total disability compensation at the rate of $133.34 per week in the sum of $16,706.17 and 289.71 weeks of compensation at the rate of $22.67 per week in the sum of $6,567.73 for a 17% permanent partial impairment to the body as a whole making a total award of $23,273.90.

As of October 13, 1994, there is due and owing claimant 125 weeks of temporary total disability compensation at the rate of $133.34 per week in the sum of $16,706.17 and 268 weeks of permanent partial compensation at the rate of $22.67 per week in the sum of $6,075.56 making a total due and owing of $22,781.73, less amounts previously paid. The remaining balance of $492.17 is to be paid at the rate of $22.67 per week for 21.71 weeks until fully paid or further order of the Director.

Kansas Workers' Compensation Fund pursuant to agreement by the parties in hereby ordered to pay 20% of all amounts paid or to be paid on this claim including expenses of administration under the Kansas Workers' Compensation Act.

Unauthorized medical expense up to $350.00 is ordered paid to or on behalf of the claimant upon presentation of proof of such expense.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed 80% to the respondent and 20% to the Kansas Workers' Compensation Fund to be paid direct as follows:

William F. Morrissey	
Special Administrative Law Judge	$150.00
Delmont Report Services	
Transcript of Preliminary Hearing (8/18/89)	226.05
Transcript of Preliminary Hearing (5/02/91)	75.80
Transcript of Preliminary Hearing (6/17/91)	106.10
Transcript of Preliminary Hearing (8/30/91)	68.65

Transcript of Preliminary Hearing (9/26/91)	60.15
Transcript of Regular Hearing	79.90
Deposition of Norma Jean Foster (12/29/92)	446.10
Deposition of Don R. O'Brien	171.30
Hostetler & Associates	
Deposition of Ernest H. Neighbor, M.D. (1/29/93)	328.45
Deposition of David A. Cooley, M.D.	254.80
Deposition of Ernest H. Neighbor, M.D. (6/15/93)	251.80
Pettigrew Reporting	
Deposition of Rose M. Ehle	311.65
Patricia K. Smith	
Deposition of Adolph R. Mueller, M.D.	229.90
Deposition of Norma Jean Foster (4/21/93)	280.80

IT IS SO ORDERED.

Dated this _____ day of October, 1994.

_____
BOARD MEMBER PRO TEM

_____
BOARD MEMBER

_____
BOARD MEMBER

cc: C.A. Menghini, 316 National Bank Building, Pittsburg, Kansas 66762
Mark E. Fern, P.O. Box 1101, Pittsburg, Kansas 66762
Blake Hudson, P.O. Box 866, Fort Scott, Kansas 66701
William F. Morrissey, Special Administrative Law Judge

George Gomez, Director, Workers Compensation